



Gen. Op. No. 11 - II 305

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April 1, 2011

Mr. Chad Livengood
Reporter
The News Journal
P.O. Box 15505
Wilmington, DE 19850

Re: Freedom of Information Act ("FOIA") Appeal of Agency Denial of Records

Dear Mr. Livengood,

You have requested a determination by the Chief Deputy Attorney General of the Department of Labor's ("DOL") denial of your FOIA request for records of the dates and times on which Anthony J. DeLuca, a DOL employee, entered any DOL facility between January 1, 2009 and December 1, 2010, the date of the request, as well as for DeLuca's attendance records for the same period.¹ This is my determination pursuant to 29 *Del. C.* § 10005(e).

THE ATTENDANCE RECORDS

On December 1, 2010, you sent a written FOIA request to DOL for, *inter alia*,

1. Copies of any and all requests for annual leave, sick leave and compensatory time;
2. Copies of all records showing accrual and use of annual leave and sick leave;
3. Copies of all records showing all compensatory time accrued . . .;
4. Copies of all time records relating to leave without pay.[.]

DOL denied those requests ("attendance records") because the records are part of a merit

¹ You originally requested "[a]ny and all card key or security badge entry records for DeLuca at all Delaware Department of Labor offices." On February 8, 2011, as part of your appeal of the denial of your original request, you modified your request to exclude identification of which facility DeLuca entered. In its response to the appeal, DOL again denied the request.

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employee's confidential personnel file:

A master personnel record for each employee shall be established and maintained by each agency. The records shall include copies of applications for employment; each Human Resources transaction; **attendance and leave records**; employee Performance Review documents; grievance records; verification of education and employment and any other records or information considered appropriate. . . . **Personnel records are confidential** and shall be maintained as necessary to ensure their confidentiality. . . . Unauthorized disclosure of any portion of a State employee's records shall be grounds for dismissal

Merit Rule 16.1 (emphasis added).

You have cited an Attorney General's opinion of May 31, 2006 as standing for the proposition that a State employee's attendance records are public records. *Op. Att'y Gen 06-IB11*, 2006 WL 1779489 (Del.A.G.). That opinion is distinguishable from the present case, however, because the employee in that case was not a Merit System employee, and therefore Merit Rule 16.1 did not protect her personnel records. Mr. DeLuca is a Merit System employee, and his personnel records, which include attendance records, are not subject to public disclosure. Merit R. 16.1; 29 Del. C. § 10002(g)(1). The records requested in items 1-4, the attendance records, are exempted from public disclosure as personnel records under the Merit Rules, and the DOL has not violated FOIA by withholding them.

THE ACCESS RECORDS

Your FOIA request also asked for "[a]ny and all card key or security badge entry records for DeLuca at all Delaware Department of Labor offices." That request was later limited to dates and times of entry, without any location identifiers ("access records"). DOL denied both of

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those requests, on the grounds that access records are covered by 29 *Del. C.* § 10002(g)(17)a, which exempts, among other things, "records, which if copied or inspected, could . . . endanger the life or physical safety of an individual."

In analyzing the breadth of this "security exception" to FOIA, it is useful to consider its history. Subsection 17 was added to FOIA after the terrorist attacks of September 11, 2001 and was intended to respond to public safety concerns raised by acts of terrorism – both foreign and domestic. Those concerns continue today. *See, e.g.* <http://giffords.house.gov/a-tribute-to-gabe-zimmerman.shtml>. Moreover, it is useful to consider that while the security of public officials are certainly center stage in this request, FOIA does not make distinctions in the character of the party whose records are requested. While in this case the News Journal seeks the records regarding a public official, in the next case may involve stalkers, a business competitor or a hate group. FOIA does not examine the character of the requestor but only the nature of the request. The fact that you are a reporter and not someone with violent intentions cannot change the analysis.

I note that the "security exception" is written with the sweeping term "could." Any record that "could" endanger life or safety is excluded. The General Assembly must be presumed to have known how to limit the breadth of this exception. It could easily have said records should be excluded if they "are likely" or "are reasonably likely" or "would" jeopardize life or safety. Its use of the term "could" must therefore be construed to mean that any record that comes within the "range" or "zone" of safety or security should be excluded from FOIA.

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When cast in those terms, I conclude that Senator DeLuca's (or any state employee's) security badge records are exempt from disclosure under FOIA

Further support for this conclusion is found in the other terms of section 17 – the “security exception.” In subsection a.3, for example, all records relating to “personnel deployments” are to be excluded from FOIA. Surely the revelation of times and dates of an employee accessing a building would indeed reveal the employees’ “deployment” for work. While we might quibble whether the work hours of a routine employee is properly considered a “deployment,” we see no distinction that would bar, then, the security badge records of police officers or other security personnel reporting to work which may indeed more directly invoke the security issue. The point is: if uses of a security badge for building access is to be considered a “public record” accessible to any member of the public who wants to know, for whatever reason, then there is no way to build a barricade beyond which certain such security badge records would be protected from public view. This is a bridge we are not willing to cross, particularly given the broad statutory mandate to exclude any record that “could” implicate security.

According to DOL, the access records are created and maintained as part of a comprehensive security system to protect DOL facilities, including the people and the information located in them.² I do not believe my role at this point is to second-guess the determination by DOL that its security system may be undermined by the disclosures sought by this request.

²DOL promulgated Policy #20, dated March 1, 2006, which explains that “[t]hese badges/cards have been provided as an additional security measure to keep our employees safe and secure . . . [by serving] as an access card for entering the buildings and secure areas within the DOL facilities.”

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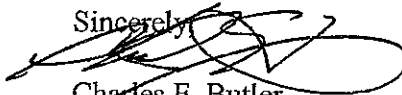
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My duty is to "ascertain and to give effect to the intent of the legislature." *Hudson Farms, Inc. v. McGrellis*, 620 A.2d 215, 217 (Del. 1993). I do not have the authority to rewrite FOIA to make it more (or less) restrictive than the legislature intended. *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 465 (2010).

DOL also claimed the access records are protected by 29 *Del. C.* § 10002(g)(1), which exempts personnel records, "the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy." According to DOL, § 10002(g)(1) applies because the access records indicate attendance, and attendance records, as part of an employee's personnel file, are protected from public disclosure by Merit Rule 16.1.

Merit Rule 16.1 provides that records that are in the "master personnel file" are protected from public view. It defines the records that are part of a master personnel file to include attendance records. DOL argues that because the access records indicate attendance, they are attendance records. Because of my decision above that the records are protected under the "security exception" above, I need not -- and therefore will not -- determine the question whether the records are also protected as "attendance records" under Merit Rule 16.1.

Sincerely,



Charles E. Butler

Chief Deputy Attorney General

cc: Linda M. Carmichael, Deputy Attorney General